

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

LILLIE MAE TRAIL,

Petitioner

v.

Civil Action No.: 2:05-0846

JAMES IELAPI, Warden,
PRUNTYTOWN CORRECTIONAL CENTER,

Respondent

MEMORANDUM OPINION AND ORDER

Pending are (1) a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed October 21, 2005, and (2) respondent's motions to dismiss the petition (a) as untimely, and (2) for failure to exhaust state remedies, both filed on January 4, 2006.

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who, on June 9, 2006, submitted her proposed findings and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). On June 21, 2006, the petitioner filed her objection.

The magistrate judge recommends that the petition be dismissed based upon the petitioner having failed to exhaust her state remedies. Having reviewed the matter de novo, the court concludes petitioner has indeed failed to exhaust the post-

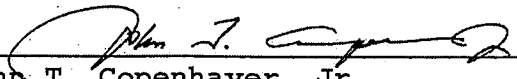
conviction remedies afforded her by the State of West Virginia. Petitioner seemingly admits as much in her objection, noting her pending petition and writ of prohibition that remain under consideration by the West Virginia Supreme Court of Appeals. Further, pending the outcome of any direct appeal of the now-resolved new trial motion discussed in the proposed findings and recommendation, and the collateral state proceedings that will likely ensue thereafter if the appeal is resolved contrary to the petitioner, the section 2254 petition is premature.

Based upon the foregoing, the court, accordingly,
ORDERS as follows:

1. That the proposed findings and recommendation be, and it hereby is, adopted by the court and incorporated herein;
2. That the respondent's motion to dismiss the petition as untimely, be, and it hereby is, denied without prejudice;
3. That the respondent's motion to dismiss for failure to exhaust state remedies be, and it hereby is, granted; and
4. That the petition, and this action, be, and they hereby are, dismissed without prejudice and stricken from the record.

The Clerk is directed to forward copies of this written opinion and order to the pro se petitioner, all counsel of record, and the United States Magistrate Judge.

DATED: July 21, 2006



John T. Copenhaver, Jr.
United States District Judge